84-1545

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees

ON APPEAL FROM THE SUPREME COURT OF MONTANA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Miller-Wohl Company, Inc., the Appellant, appeals from the final judgment of the Supreme Court of Montana, dated December 28, 1984, holding that the Montana Maternity Leave Act, MCA 39-7-201, et seq., is not violative of or pre-empted by the Fourteenth Amendment, Equal Protection Clause, of the Constitution of the United States, or Titles VII and XI of the U.S. Civil Rights Act of 1964, as amended.

QUESTIONS PRESENTED

Whether the Montana Maternity Leave Act, a preferential treatment law, is violative of and preempted by Titles VII and XI of the U.S. Civil Rights Act of 1964, as amended, an equal treatment law, and/or repugnant to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF MONTANA

The parties to the proceedings in the Supreme Court of Montana are those set forth in the caption; namely, The Miller-Wohl Company, Inc., and the Commissioner of Labor and Industry of the State of Montana and Tamara L. Buley.

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OPINIONS BELOW

The opinion of the Supreme Court of Montana, which appears in the appendix hereto, p. 1b, is reported at 692 P.2d 1243.

The decision of the District Court of the Eighth Judicial District of the State of Montana is not reported. It is reprinted in the appendix hereto, p. 1c.

The findings of fact, conclusion of law, and order of the Commissioner of Labor and Industry of the State of Montana are not reported. They are reprinted in the appendix hereto, p. 1d.

JURISDICTION

The judgment of the Supreme Court of Montana, reversing the lower court (the District Court) and reinstating the Commissioner's order, was entered on December 28, 1984. See p. 1b, *infra*.

The notice of appeal to this Court was duly filed in the Supreme Court of Montana on January 28, 1985. See p. 1a, *infra*.

This appeal is being docketed in this Court within 90 days from the date of judgment by the Supreme Court of Montana. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 701(k) of Title VII, U.S. Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(k):

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Section 703(a) of Title VII, 42 U.S.C. § 2000e-2:

(a) It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 708 of Title VII, 42 U.S.C. § 2000e-7:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law

which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 1104 of Title XI, U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000h-4:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof.

Chapter 7, Title 39, Revised Codes of Montana, MCA Sections 39-7-201 through 209 (The Montana Maternity Leave Act — MMLA):[1]

39-7-201. *Definitions.* (1) "Commissioner" means the commissioner of labor and industry. (2) "Employer" means any public or private employer.

39-7-203. *Unlawful acts of employers.* It shall be unlawful for an employer or his agent to: 1) terminate a woman's employment because of her pregnancy; 2) refuse to grant the employee a reasonable leave of absence for such pregnancy; 3) deny to the employee who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer; provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; 4) retaliate against any employee who files a complaint with the commissioner under the provisions of

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[1] Effective July 1, 1983, the Maternity Leave Act was recodified at MCA 49-2-310 and 311.

this part; or 5) require that an employee take a mandatory maternity leave for an unreasonable length of time.

39-7-204. *Reinstatement to job following pregnancy-related leave of absence.* Upon signifying her intent to return at the end of her leave of absence, such employees shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

39-7-205. *Complaints of Violations.* (1) A person claiming to be aggrieved by a violation of 39-7-203 or 39-7-204 may make, sign, and file a verified complaint with the commissioner, which shall state the circumstances of the violation and the particulars thereof and shall contain such other information as may be required by the commissioner. (2) In addition, the commissioner whenever he has reason to believe that section 39-7-203 or 39-7-204 has been or is being violated, may issue a complaint.

39-7-206. *Investigative powers of commissioner.* (1) The Commissioner or his authorized representatives may enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they consider appropriate, to determine whether any person has violated any provision of this act or any regulation issued hereunder or which may aid in the enforcement of the provisions of this act. (2) The commissioner or his authorized representatives may administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses, and the production of papers, books, accounts, records, payrolls, documents, and testimony, and take depositions and affidavits in any proceeding before the commissioner.

39-7-207. *Findings of fact and decision on complaint.* (1) Within 60 days of the receipt of a complaint, the commissioner shall state his findings of fact and decision.

(2) If, upon all the evidence, the commissioner finds that a respondent has engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall order the respondent to reinstate the complainant if she so desires and to pay to the complainant the damages resulting from the violation. (3) If, upon all the evidence, the commissioner finds that the respondent has not engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall dismiss the complaint.

39-7-208. *Individual action.* Nothing in this act shall preclude an individual from prosecuting a private action in the district court alleging violation of the provisions of this act or any other act.

STATEMENT OF THE CASE AND RAISING THE FEDERAL QUESTIONS

The Appellant owns and operates a chain of retail ladies' apparel stores throughout the United States, several of which are in Montana. Appellant has operated with a set of written employment policies and practices, entitled "Employees Guide," which sets forth the employment standards uniformly used by it throughout all of its stores in the United States, including Montana. The Guide sets forth the policy providing for equal employment opportunities and prohibiting discrimination because of race, color, religion, sex, national origin, or age. The Guide also sets forth, and Appellant's practices have uniformly been applied, that no employee, male or female, is entitled to sick leave or leaves of absence until they have been employed for at least one (1) year. There have been no exceptions to this uniform policy for disabilities, illnesses, pregnancies or other reasons for leaves, for any employees — male or female.

On August 1, 1979, Appellee Tamara Buley (hereinafter "Buley") was hired as a part-time sales clerk in the Appellant's Great Falls, Montana, store. Within a matter of days, Buley missed work, reported late or left early, and did not perform the necessary duties and functions of her

job while she was at work. As a result of her unsatisfactory performance, Buley was discharged on August 27, 1979. At the time, Buley was pregnant and had so advised Appellant's store manager.

On January 9, 1980, Buley filed a Complaint with the Montana Human Rights Commission (MHRC) alleging that her termination from employment was due to her pregnancy and constituted sex discrimination under the Montana Human Rights Act (MHRA), MCA § 49-2-303. At the same time, Buley filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), also alleging that her termination was due to pregnancy and sex and was in violation of Title VII. The MHRC is a deferral agency under Title VII and recognized by the EEOC.

The MHRC investigated the case and on June 10, 1980, it issued a Reasonable Cause Finding. However, in doing so, the MHRC specifically found that there was no violation of the MHRA nor Title VII, but noted that a violation of the Montana Maternity Leave Act (MMLA) may have resulted. This reference to the MMLA apparently led to Buley's filing her Complaint on August 6, 1980 with the Appellee Commissioner of Labor and Industry (hereinafter "Commissioner") under the MMLA.

Subsequently, the EEOC dismissed Buley's charge of discrimination. Neither the MHRC, the EEOC, nor Buley initiated any further administrative action or court action regarding Buley's alleged claim of sex discrimination.

When Appellant was served with a copy of the Commissioner's Notice of Hearing and Buley's Complaint, it filed a Complaint for injunctive relief and declaratory judgment in the U.S. District Court for the District of Montana, setting forth that the MMLA was in conflict with and, therefore, in violation of and preempted by Titles VII and XI of the U.S. Civil Rights Act (as amended), that the MMLA was a state protective law, and that the MMLA violated the Fourteenth Amendment of the U.S. Constitution.

Pending hearing for injunctive relief, the Federal District Court issued a restraining order. Subsequently, the restraining order was dissolved and the Commissioner proceeded with its hearing on Buley's Complaint. Concurrently, the Federal District Court entertained motions, briefs and arguments regarding the question of jurisdiction and the substantive issue.

On October 1, 1980, the Commissioner held a hearing and on October 3, 1980, issued his findings of fact, conclusions of law, and order. At the earliest stage of this administrative proceeding, the Appellant raised the claim that the MMLA was violative of and preempted and superseded by Titles VII and XI of the U.S. Civil Rights Act of 1964, as amended, and that it was repugnant to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Commissioner's Finding of Fact and Conclusions of Law, 1d, *infra*. With regard to Appellant's claim of unconstitutionality under the Equal Protection clause, the commissioner set forth that the Montana Maternity Leave Act was constitutional because "the classification itself has a rational basis, a nondiscriminatory intent, and bears a close relationship to important governmental objectives." *Id.*, p. 21d, *infra*. As to the preemption claim, the Commissioner found that Congress did not intend to preempt all state protective legislation by enactment of Titles VII and XI. In concluding that Appellant had violated the MMLA by dismissing Buley, the Commissioner ruled that Buley was entitled to backpay and penalties.

On October 31, 1980, Appellant filed a Petition for Judicial Review of the Commissioner's Decision/Order with the District Court of the 8th Judicial District of the State of Montana (hereinafter "District Court"). In this appeal, the preemption and unconstitutional claims were again raised by Appellant.

Pending the Federal Court actions[2] and then after holding hearings on motions and receiving briefs, on February 4, 1984, the District Court entered its Order in favor of Appellant. The District Court reversed the Commissioner and held that the MMLA was discriminatory, was a denial of equal protection of the law, was a protective and preferential statute, and was preempted by Titles VII and XI. Decision of the District Court, p. 1c, *infra*.

On March 9 and 22, 1984, Notices of Appeal were filed by Buley and the Commissioner, respectively, with the Supreme Court of Montana. After receiving briefs, including briefs from at least 6 Amici Curiae, and hearing argument, the Supreme Court reversed the District Court and found the MMLA valid.

In the appeal to the Supreme Court of Montana by the Appellees, the issues presented, briefed, and argued dealt with the preemption and equal protection questions. Opinion of the Supreme Court of Montana, p. 2b, *infra*. The Court concluded that the Montana Maternity Leave Act was not preempted by Title VII and that it was consistent with the federal laws. *Id.*, p. 25b, *infra*. Although referring to the issue of constitutionality, the Court did not address it. It must be concluded that a finding of the constitutionality of the MMLA is subsumed in its judgment and its reversal of the lower court's decision.

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[2] Although finding that it had jurisdiction (Memorandum Decision dated October 2, 1980), the Federal District Court did not issue a decision on the preemption and constitutional issues until June 1981. At that time, the Federal District Court ruled against the Appellant. 515 F.Supp. 1264 (D.Mont., 1981). Appellant appealed, raising the same issues, to the Ninth Circuit Court of Appeals. The Ninth Circuit determined none of the issues. Instead, the Court of Appeals ruled that Appellant had raised federal defenses to state claims, all of which could be raised in the State Court proceedings which were pending at the time, and therefore failed to establish federal subject matter jurisdiction. The Court thus dismissed the appeal and vacated the Federal District Court's decision. 685 F.2d 1088 (9th Cir., 1982).

THE QUESTION IS SUBSTANTIAL

The question of whether a state law granting preferential treatment to pregnant employees is violative of the federal equal treatment laws is a novel and substantial one. Although this Court has held that state laws requiring different treatment to persons on the basis of their sex is in violation of the Equal Protection Clause (e.g., *Reed v. Reed*, 404 U.S. 71 (1971)), and has construed the Pregnancy Disability Amendment (PDA), Section 701(k), to require the treatment of pregnancy to be consistent with Title VII principles (see *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)), this case presents the Court with a case of first impression regarding the issue of whether a state law expressly granting preferential treatment to pregnant employees is a permitted state action that is consistent with and not repugnant to the federal civil rights laws and constitution.

In 1978, Congress amended Title VII by enacting the PDA in order to make clear that pregnancy-based distinctions would be subject to the same scrutiny on the same terms as other acts of discrimination proscribed in Title VII and that pregnant employees had to be treated the same as other employees on the basis of their ability or inability to work. See 5 U.S. Code Cong. & Ad. News 4749, at 4751-2 (1978).

In its decision, the Montana Supreme Court noted that when Congress enacted the Civil Rights Act in 1964, it stated in Section 708 that nothing in Title VII "shall be deemed to exempt or relieve any person from . . . any present or future law of any state . . . other than any such law which purports to require or permit the doing of any act" that would violate Title VII.

The Montana Maternity Leave Act (MMLA) provides that employers shall not "terminate a woman's employment because of her pregnancy" and cannot "refuse to grant the employee a reasonable leave of absence for such

pregnancy." The Montana Supreme Court held that the objectives of the MMLA and Title VII are the same — equality — and that the policy and purpose of the MMLA ("to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females") (infra, p. 4b) is to establish equality.

In its decision, however, instead of analyzing and construing the *State law* — the MMLA — in relation to the Federal law and constitution, which was the only issue on appeal, the Montana Supreme Court applied Appellant's employment policies to see if they violated Title VII.

In light of the unusual treatment of the case by the Montana Supreme Court, it is difficult to indicate to this Court why it is imperative that it should accept this appeal and hear the case (or reverse summarily) without engaging in some argument. Due to the nature of the issues and the Montana Supreme Court's lack of treatment thereof, concomitant with its unique approach to the case, it requires some argumentative points to be made. Appellant therefore requests the Court's indulgence.

In two specious syllogistic schemes, the Montana Supreme Court reasoned and held, first:

1. Appellant discharged Buley because she was pregnant;
2. Title VII prohibits discrimination because of sex, which includes pregnancy;
3. Therefore, Appellant violated Title VII;
4. Since the MMLA prohibits discharges because of pregnancy, as does Title VII, the MMLA is consistent with Title VII.

Second:

1. Appellant's leave policy was facially neutral;
2. Appellant's leave policy was inadequate and had a gender-based disparate impact on pregnant employees under Title VII;

3. Therefore, Appellant violated Title VII;

4. Since the MMLA requires that employers grant leaves of absence to pregnant employees, it is consistent with Title VII.

The fallacies of the Montana Supreme Court's illogic reasoning are many and substantial, and highlight the necessity for this Court's review and disposition. In order of treatment hereinafter, the issues and sub-issues are these: The failure to construe and analyze the MMLA in relation to the federal laws and constitution; the failure to judicially measure the statutory classification within the requisite standards for reviewing laws that are alleged to violate the constitutional requirement of equality; and its improper finding of a violation of Title VII by Appellant under both the disparate treatment and disparate impact theories of discrimination.

The MMLA In Relation to Title VII.

Do Title VII and PDA require equal treatment or do they permit preferential treatment? Does Title VII and PDA preclude states from enacting laws that are inconsistent with the national policy? In legislatively overruling *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), Congress established that the PDA, operating as part of Title VII, prohibits discriminatory treatment. As part of Congress' stated purpose for enactment of the PDA, the following was set forth:

> In enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment. We are left in a state of national confusion and with inconsistent practices from State to State.
>
> As testimony received by this committee demonstrates, the assumption that

> women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and deadend jobs. [PDA] unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.

5 U.S. Cong. & Ad. News at 4751 (1978).

In the stated basic principles of the PDA, the following was set forth:

> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [PDA] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.
>
> The "same treatment" may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.
>
> . . .

> [PDA] will not require an employer who does not provide disability benefits or paid sick leave to other employees to provide them for pregnant workers. In addition, [PDA] would permit employers who provide a voluntary unpaid leave policy to continue to do so, as long as the plan is not discriminatory. If an employer has a disability insurance plan or paid sick leave policy, he or she will not be allowed to reduce benefits to comply with [PDA]. The only time the employer will be required to allow pregnant workers to use this leave is during the time they are medically unable to work, during the same period of time and under the same terms applicable to other employees.

Id. at 4752-3. Throughout the text of the legislative report, the premise of equal, and not special or preferential treatment, was emphasized.

The enactment of PDA and its equal — and not preferential — treatment was discussed in *Arizona Governing Committee v. Norris,* U.S. , 77 L.Ed.2d 1236, 1248-49 (fn. 14) (1983), as buttressing this Court's holding in *Los Angeles Dep't. of Water & Power v. Manhart,* 435 U.S. 702 (1978), which made these two points: (1) Title VII requires employers to treat their employees as *individuals* and not as simply components of a racial, religious, sexual, or national class (435 U.S. at 708); and (2) classifications based on sex, like those based on national origin or race, are unlawful — for under the statute "even a true generalization about a class cannot justify class-based treatment." 435 U.S. at 708; *Id.* at 1248. Further, as pointed out in *Norris,* the purpose of the PDA is simply to make the treatment of pregnancy consistent with general Title VII principles which forbid special treatment to pregnant employees. *Id.* at 1249 (fn. 14).

Unlike Title VII and PDA, the MMLA does not take into consideration the pregnant employee's ability or inability to work. It grants pregnant employees special employment rights not enjoyed by any other employees. Also, unlike Title VII and PDA, the MMLA does not require a pregnant employee to be disabled from working in order to be eligible for a leave or be protected from discharge. On the other hand, as stated in the statutory provision and noted throughout the legislative history, the PDA only requires equal employment treatment when the pregnant employee is disabled.

The three unlawful acts set forth in MMLA Sec. 203 state that it is unlawful for an employer to:

> "(1) terminate a woman's employment because of her pregnancy;
>
> (2) refuse to grant the employee a reasonable[3] leave of absence for such pregnancy;
>
> (3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits . . ." (emphasis added)

Subsections (1) and (2) apply to employees who are pregnant and not to only those employees who are disabled as a result of pregnancy. Subsection (3), however, specifically delineates the pregnant employee who is disabled as a result of such pregnancy. This distinction is significant because it

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[3] The statute does not specify what a "reasonable" leave shall be, nor the time period to be encompassed. Since the right to a leave is not contingent on disability and since the title of the law is "Maternity Leave," its vagueness could readily be construed to also include time for child rearing, following the termination of the pregnancy and postpartum recovery period. See also MMLA Sec. 204 which requires reinstatement following the "pregnancy-related" leave. (As with Sec. 203, this section provides preferential treatment.)

establishes that the MMLA and the Montana legislature unambiguously stated and intended that subsections (1) and (2) of the MMLA cover any and all pregnant employees, whether or not they are experiencing any kind of disability. Thus, the provisions of the MMLA require an employer to grant a maternity leave of absence to a pregnant employee whether she is able or unable to work.

The question of ability or inability to work is not only a critical feature of the PDA, it has been held to be the touchstone for determining whether or not Title VII has been violated. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the standard for equal employment opportunity is based upon the worker's ability to perform the job:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

401 U.S. at 430-31.

To the Montana Supreme Court, apparently, the employee's working qualifications are irrelevant to both Title VII and the MMLA. Although finding that Buley was terminated because of her inadequate job performance (the same finding made by the Commissioner and District Court),[4] the Court ignored the fact in reaching its decision.

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[4] The Commissioner found that "Mrs. Buley was terminated because she was unable to adequately perform her duties; . . . because she was pregnant." Infra, p. 3d. The District Court found that "[Buley] was terminated because she was not performing her job satisfactorily caused by her pregnancy related sickness." Infra, p. 2c. The Supreme Court, after setting forth specific job performance problems experienced with Buley, stated that ". . . Miller-Wohl terminated Tamara's

While it is also a fact that Buley's unsatisfactory performance was occasioned by her pregnancy, the failure of the Court to analyze the MMLA based upon the national policy expressed in *Griggs* raises the significant question of Griggs' authoritativeness. Therefore, this Court should resolve this important point. Is a State employment discrimination law that is *not* grounded on the employee's working qualifications in contradiction of the Federal law and national policy?

Was the PDA intended to apply only to policies and practices of employers? Does the PDA exempt State laws from inclusion within the meaning and prohibitions of Title VII? According to the legislative history of the PDA, Congress sought to preclude both employers and States from treating pregnancy-related disabilities differently from the various other physical or medical conditions that may temporarily disable a worker. Pregnant employees who are able to work must be allowed to work on the same basis as other employees; and when they are disabled for medical reasons, they must be accorded the same rights, leave privileges and benefits as other employees who are disabled from working. (See, S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977), *reprinted in* Leg. Hist. at 41.)

As the following exchange between Senators Hatch and Williams reveals, the intent of the sponsors was that States would be free to act *only* within the non-discriminatory context established by the PDA:

> Mr. Hatch. Do the managers and sponsors of this bill intend S.995 to be preemptive of State laws so that no employer shall be required to take any action with regard to any pregnancy related disability benefit, or to pay any such benefit which shall exceed the requirements of this act, by reason of any State or local law . . . ?

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employment, undoubtedly because her pregnancy diminished her effectiveness as a sales clerk." Infra, p. 5b.

> Mr. Williams. . . . Title VII does not preempt State laws which would not require violating Title VII. This is made clear by existing law. Section 708 of Title VII, as well as section 706(c), expressly provides that State laws which protect employees from discrimination shall remain in effect unless they operate to permit or require discrimination . . . .
>
> . . . it would be a question of whether there was discrimination . . . . [If] the classification and selection were discriminatory, then the State law that discriminated would not be permitted to stand . . .

124 Cong. Rec. S. 29643-4 (daily ed., Sept. 16, 1977), *reprinted in* Leg. hist. at 78-79.[5]

Based upon the foregoing, this Court should provide guidance as to the meaning and intent of Title VII and PDA as it relates generally to State laws (and specifically to the MMLA) that require special or preferential treatment for pregnant employees to the exclusion of all other employees.

The MMLA in Relation to the Equal Protection Clause.

Since the MMLA identifies pregnant employees as a distinct and separate group of employees who require special benefits, should it share the same scrutiny with

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[5] Despite its holding that the objectives (i.e., equality) of the MMLA and PDA are consistent, the Montana Supreme Court tacitly admitted that the MMLA provides special treatment to a special class of employees when it embraced the doctrine of extension. In its summary of determination, the Court stated:

> "(6) By the simple expedient of requiring an employer to extend the same leave rights to all employees temporarily disabled as are extended to pregnant women under the MMLA, the Montana legislative purpose to provide equality of opportunity in employment could be preserved, and the provisions of the MMLA and Title VII reconciled."

Infra, p. 4b.

other forms of protective or beneficial legislation that have singled out females for special and different treatment? While there is no doubt that pregnancy is different from other physical or medical conditions that may cause an employee to become temporarily disabled from working, should that fact be irrelevant in the employment setting? Is the MMLA a gender-based law that mandates a finding of its being "substantially related" (as opposed to "rationally related") to an important state interest? If so, does it meet (or fail) an equal protection challenge?

This Court has explained that a statute intended to benefit females will not necessarily pass judicial muster:

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. (citations omitted) Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored.

Orr v. Orr, 440 U.S. 268, 283 (1979).

Even the noble purpose of the MMLA, as expressed by the Montana Supreme Court, does not alter the fact that it appears to be gender-based legislation requiring special protection for pregnant workers as a form of compensation for their special burden. This Court has made it clear that:

> [I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap . . . , the objective itself is illegitimate.

Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982). Moreover, as set forth in the *Mississippi University* case, gender-based legislation will be upheld only when a legitimate and substantial goal is actually furthered by the maintenance of a sex-based disparity:

> The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 732, n.17.

Can an admittedly preferential law that measures people in the abstract, and which is contradictory to both the Federal and Montana *equal* employment opportunities legislation (Title VII and MHRA), achieve a legitimate and substantial governmental objective? Is the MMLA the only reasonable alternative or remedy available? Or is there sufficient legislation and constitutional protection of women regarding employment and pregnancy discrimination? Are not Title VII and PDA designed specifically to equalize job opportunities for pregnancy-disabled workers and to insure their stability in the workplace?

The Use and Findings of Disparate Treatment and Disparate Impact.

Unfortunately, the Appellant — and not the MMLA — was put on trial by the Montana Supreme Court. Whether Appellant complied with or violated Title VII was not the issue in any of the proceedings involving this case. The only issue in review for the Montana Supreme Court and, respectfully submitted, for this Court is whether the MMLA is in violation of Title VII and the Equal Protection Clause.

Without being given the opportunity of defending itself, the Montana Supreme Court found Appellant in violation of Title VII. This was accomplished without the requisite standards of proof so carefully pronounced and emphasized by several Supreme Court decisions. With regard to discrimination because of disparate treatment, the case of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), clearly enunciated the special order of proof in such cases. The initial stage is described as plaintiff's

making out a prima facie case by adducing evidence consisting of 4 factors. If the plaintiff makes out a prima facie case, the burden then shifts to defendant to articulate a legitimate non-discriminatory reason for its action. This "shifting burden" is one of going forward with the evidence; it is *not* one of persuasion, which was the primary holding in *Burdine*.

In the instant case, Appellant never had the privilege (let alone the right) of the required order and allocation of proof. The Montana Supreme Court's decision therefore must be reviewed in this light. This Court must determine if its well-developed requirements of proof have application to a State court's decision regarding alleged discrimination under Title VII when the issue is whether the State law violates Title VII.

Just as significantly, the Court found Appellant guilty of Title VII discrimination on the theory of disparate impact *without* benefit of the required tripartite order and allocation of proof. The clearly-established scheme of proof in disparate impact cases provides that a plaintiff must prove that the facially-neutral employment standard has a significantly discriminatory impact. After the establishment of such proof, the burden shifts to the defendant-employer, who must demonstrate that "any given requirement has a manifest relationship to the employment practice in question." Should the employer meet its burden, the plaintiff can overcome the defense by proving that the employer was using the practice as a mere pretext for discrimination. *Connecticut v. Teal,* 457 U.S. 440, 447-48 (1982). Needless to say, since the instant case did not involve the question of whether or not Appellant violated Title VII — nor was a prima facie case of disparate impact ever presented — the Montana Supreme Court's decision appears to contravene the requirements espoused by this Court. Whether such contravention should stand as a diversion from the primary issue in the case is of significance and should be resolved by this Court.

Additional Basis For Judicial Guidance.

As stated at the outset, this is a case of first impression for this Court. However, it is not the only case where the issue of special treatment for pregnant employees is before the Courts. In a case pending before the Ninth Circuit Court of Appeals, the issue involves a California law that requires special treatment for pregnant employees. In *California Federal Savings & Loan Ass'n. v. Guerra,* F.Supp. , 34 FEP Cases 562 (C.D. Cal. 1984), the Federal District Court construed the California statute and held that a State law requiring an employer to give females disabled by pregnancy preferential treatment and rights for a period of time after the conclusion of the disability leave of absence was in conflict with and violative of Title VII.

Pending before the Massachusetts Supreme Court is a case wherein one of the issues is whether preferential treatment for pregnant employees should be read into a State law. In *Solomon v. School Committee of the City of Boston,* No. SJC-3669, a discharged teacher is seeking to have the time she was on a pregnancy leave credited to her for purposes of granting her tenure status under the Massachusetts law.

The issues involved in the instant case and the *California Federal Savings & Loan* case have received prominence and notoriety. These cases were featured on the CBS-TV news program "60 Minutes" on December 2, 1984.[6]

Thus, the issue(s) in the instant case have a significance to the courts — Federal and State — and to employers and employees throughout the United States. Should nationwide employers (like Appellant) consider Title VII as exclusive? Or do they have to alter their policies and practices to conform to different State laws? If an employer

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[6] NBC-TV has also expressed an interest in the issue in the instant case. They have indicated a desire to feature the case in a forthcoming news program to be entitled "Women in the Workplace."

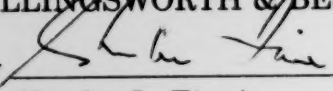
complies with a special-treatment law in one State, has it engaged in disparate treatment when it acts differently in another State? Is there a conflict between State and Federal laws when an employer cannot comply with both the Federal and State laws? These "horns-of-a-dilemma" problems were the reasons for the Appellant to question the legality of the Montana Maternity Leave Act. Now, as then, resolution of the issue(s) is of grave importance and urgency to/for the courts, legal representatives, and employers and employees.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

RESPECTFULLY SUBMITTED,

O'CONNOR, CAVANAGH,
ANDERSON, WESTOVER,
KILLINGSWORTH & BESHEARS

By 

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[Docketed by Court on February 1, 1985]

IN THE SUPREME COURT
OF THE STATE OF MONTANA

THE MILLER-WOHL COMPANY, INC.,	)	
Appellant,	)	
vs.	)	
COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,	)	NO. 84-172
Appellees.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Miller-Wohl Company, Inc., the above captioned Appellant, hereby appeals to the United States Supreme Court from the final judgment of the Supreme Court of the State of Montana, reversing the judgment and order of the District Court and reinstating the Commissioner's Findings, Conclusions and Order, entered in this action on December 28, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

* * *

DATED this 28th day of January, 1985.

O'CONNOR, CAVANAGH,
ANDERSON, WESTOVER,
KILLINGSWORTH & BESHEARS

By /s/ Charles L. Fine
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Notice of Appeal to the Supreme Court of the United States was mailed, first-class postage prepaid, this 29th day of January, 1985, to the following counsel of record:

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No. 84-172

IN THE SUPREME COURT OF THE
STATE OF MONTANA

1984

[692 P.2d 1243]

THE MILLER-WOHL COMPANY, INC.,
Petitioner and Respondent,

v.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
Respondents and Appellants.

APPEAL FROM:
District Court of the Eighth Judicial District, In and for the County of Cascade, The Honorable Joel G. Roth, Judge presiding.

COUNSEL OF RECORD:

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For Amicus Curiae:

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Submitted: September 26, 1984
Decided: December 28, 1984

FILED: DEC 28 1984
/s/ Ethel M. Harrison
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

This is an appeal by Tamara L. Buley and the Commissioner of Labor and Industry from a judgment of the District Court, Eighth Judicial District, Cascade County, finding the Montana Maternity Leave Act invalid and reversing a decision of the Commissioner in favor of Tamara for back wages and penalties.

We reverse the judgment of the District Court.

We determine for the purpose of this action that the employment policy of Miller-Wohl was one of no leave of absence for temporarily disabled employees until the end of their first year of employment.

In short summary of our decision, we make the following determinations:

(1) Miller-Wohl's discharge of Tamara because of her pregnancy was in direct violation of the Montana Maternity Leave Act (MMLA). Moreover, as Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act of the federal government are interpreted by federal regulations, it appears that Miller-Wohl's no leave policy and discharge of Tamara may have violated those federal acts.

(2) Usually an attack on legislation alleged to be discriminatory is mounted by a person discriminated against. In this case Miller-Wohl, as an employer, was not discriminated against by the MMLA, but it nevertheless has standing to raise validity of MMLA.

(3) Miller-Wohl's no-leave policy created a disparate effect on women who become pregnant, compared to those employees who do not become pregnant. Although facially neutral, its no-leave policy subjected pregnant women to job termination risk on a basis not faced by men. The no-leave policy therefore was sexually discriminatory in violation of Title VII and the Pregnancy Disability Act.

(4) The policy and purpose of Title VII and the PDA is to eliminate discrimination in employment policies.

(5) Miller-Wohl's termination of Tamara directly violated the MMLA. The policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females. Its objective in that field, equality, is the same as the objective of Title VII. We do not agree that MMLA violates Title VII because it is gender-based in its operation, in that it protects women without at the same time protecting others equally.

(6) By the simple expedient of requiring an employer to extend the same leave rights to all employees temporarily disabled as are extended to pregnant women under the MMLA, the Montana legislative purpose to provide women equality of opportunity in employment could be preserved, and the provisions of the MMLA and Title VII reconciled.

(7) Courts have recognized judicial power in discrimination cases to save the legality of questioned legislative enactments by the doctrine of extension, extending the same benefits to those who would otherwise be discriminated against. This case presents a proper one for judicial extension. However, because the legislature is meeting shortly we defer to the legislature for its action in this field.

(8) We find the MMLA valid.

I.

Miller-Wohl hired Tamara Buley as a retail sales clerk at its Three Sisters store in Great Falls, Montana on August 1, 1979. She was employed to work full time (34–36 hours a week) during the store's two busy months, August and December, and part time (16–20 hours a week) for the rest of the year. She was, according to the store manager, a "regular employee."

Tamara missed two and a half days of work during her first week on the job because of what she thought was the 'flu. On August 13, 1979, she discovered she was pregnant and soon after told her supervisor. During the next two weeks she suffered from "morning sickness." She felt nauseated and faint, and as a result missed time from work, had to leave the selling floor for breaks, and spent considerable time in the store bathroom vomiting, and was sent home early on occasion. On August 27, 1979, Miller-Wohl terminated Tamara's employment, undoubtedly because her pregnancy diminished her effectiveness as a sales clerk.

Tamara filed a complaint against Miller-Wohl with the Montana Commissioner of Labor and Industry (Commissioner). She claimed that Miller-Wohl had violated the Montana Maternity Leave Act (MMLA).

Miller-Wohl then brought suit against the Commissioner and Tamara in United States District Court for the district of Montana, asking the federal court to declare the MMLA invalid and to enjoin its enforcement. The court issued a temporary restraining order for a brief period, but then permitted the state agency to proceed.

On October 1, 1980 the Commissioner held a hearing and on October 3, 1980 issued an administrative order with findings and fact and conclusions of law that Miller-Wohl had violated the MMLA by dismissing Tamara Buley; that the MMLA neither offended Equal Protection guaranties nor was preempted by Title VII of the Civil Rights Act of 1964; and that Tamara was entitled to back pay and penalties in the amount of $6,573.60.

The federal district court concurred in the Commissioner's conclusions. Miller-Wohl Co. v. Commissioner of Labor and Industry, 515 F.Supp. 1264 (U.S.D.C. Mont. 1981). In addition the federal court found that Miller-Wohl could comply with the PDA and MMLA by simply granting leave to all employees who miss work because they are sick or disabled. 515 F.Supp, at 1267.

The decision of the federal district court was appealed to the U.S. Court of Appeals for the Ninth Circuit. That court determined none of the issues. Instead it concluded that Miller-Wohl's complaints failed to present an affirmative federal claim over which the court could assert jurisdiction and dismissed the action. Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, et al. 685 F.2d 1088 (U.S.C.A. 9, 1982). This dismissal left the District Court opinion without precedential effect.

Miller-Wohl also petitioned the state court for a review of the Commissioner's decision. On February 8, 1984, the District Court for Cascade County reversed the Commissioner's order. The District Court held that the MMLA is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring nondisabled pregnant employees to the discrimination of disabled nonpregnant employees and disabled male employees, and is preempted by Titles VII and XI of the Federal Civil Rights Act.

The Commissioner and Tamara appeal from the decision of the District Court, which brings the case to us for determination.

II.

The MMLA was adopted by the legislature in 1975 (formerly Section 39-7-201, -208, MCA, (1978); now Section 49-2-310, -311, MCA, (1983)). It provides in pertinent part:

> "Maternity Leave — Unlawful Acts of Employers. It shall be unlawful for an employer or his agent to:
>
> "(1) terminate a women's employment because of her pregnancy;
>
> "(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy; . . ."

The MMLA is a legislative recognition of changing economic mores in American family life. We are told that in 40% of American households there is a working wife or mother. A growing number of single women support themselves, or themselves and children. In family households the need for two paychecks spreads across the economic spectrum. Even young upwardly-mobile professionals (Yuppies), like a biplane, need two wings working to stay aloft. Economic necessity has converged with the growing insistence of women for equal opportunity in all fields to bring about legislative enactments such as the MMLA. The biblical imprecation that the male shall eat his bread by the sweat of his brow has been broadened; Eve is now included.

Congress has responded to these forces by including in the Civil Rights Act of 1964 provisions outlawing discrimination in employment because of gender. Section 703(a)(1) of the Act provides that it is an unlawful employment practice for an employer:

> "to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin, . . .*" 42 U.S.C. § 2000e-2(a)(1)

The provisions of the Civil Rights Act of 1964 relating to sex discrimination in employment (hereafter Title VII) were tested in General Electric Co. v. Gilbert (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343. General Electric, as a self-insurer, had provided nonoccupational sickness and accident benefits to all its employees amount to 60% of their straight-time weekly earnings up to a maximum of 26 weeks. Several women employees became pregnant while employed by General Electric, and while the plan was in effect, and presented a claim to the company for disability benefits under the plan to recover for the period while each was absent from work as a result of the pregnancy. The claims were routinely denied on the ground that the plan

did not provide disability benefit payments for any absence due to pregnancy. The women employees charged that the refusal of General Electric to pay disability benefits under the plan for time lost due to pregnancy and child birth discriminated against them because of sex, and so violated Title VII. The United States Supreme Court refused to recognize the propriety of an Equal Employment Opportunity Commission guideline that pregnancy disability should be treated on the same terms and conditions as other temporary disabilities, and held that pregnancy-related disabilities constitute an additional risk unique to women, and that the failure of General Electric to compensate women for this risk did not destroy the presumed parity of the benefits accruing to men and women alike which resulted from the facially evenhanded inclusion of risks in General Electric's Plan.

The congressional response to the decision in *Gilbert* was an amendment in 1979 to Title VII to include the Pregnancy Disability Act, Section 701(k) (PDA). The pertinent provision of PDA is:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(A) of this Title shall be interpreted to permit otherwise . . ."

The outpouring of congressional statements at the time of the passage of PDA in the House and Senate Reports and by House members and senators on the floors of their respective houses indicate the passion and determination of congressional members to ban discrimination of all types

in employment practices. Illustrative with respect to the PDA was the House Report:

> "As testimony received by this Committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low paying and deadend jobs. H.R. 6075 [PDA] unmistakenly reaffirms that sex discrimination includes discrimination based on pregnancy and specifically defines standards which require the pregnant workers be treated the same as other employees on the basis of their ability or inability to work." 5 U.S. Code Cong. & Admin. News 4749, 4751 (1978).

In adopting the Civil Rights Act of 1964, and the PDA, Congress indicated its intention to permit state action consistent with those acts. Section 42 U.S.C. 2000h-4 reads:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such Title operates or to the exclusion of state laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of state law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof."

Title VII of the Act, concerning employment discrimination also contains a section, Section 42 U.S.C. 2000e-7 which reads:

> "Nothing in this subchapter [Title VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any state or of any subdivision of a state, other than any such law which proports to

> require or permit the doing of any act which would be an unlawful employment practice under this chapter."

One further provision of the MMLA should be noted. Reinstatement of the pregnant employee after leave of absence is required in the Act. Former Section 39-7-204 (now Section 49-2-311) provides:

> "*Reinstatement of job following pregnancy-related leave of absence.* Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits, unless in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

The foregoing paragraphs summarized the federal and state enactments under which Tamara's case must be resolved.

III.

The issue to be decided here is whether the MMLA is invalid because of, or preempted by, Title VII and the PDA. If the answer is affirmative, Tamara has no case and the judgment in the District Court must be affirmed.

On her appeal Tamara contends that the MMLA is consistent with the purposes of Title VII which is to eliminate employment discrimination between the sexes; that the MMLA does not violate Title VII because it does not limit, deprive or adversely affect the employment opportunities of any individual; that the MMLA which grants reasonable leave for pregnancy disabilities is not a state protectionist law in violation of Title VII; that the MMLA is not preempted by Title VII for the reason that Congress did not intend to preempt state laws by the passage of PDA

and in fact specifically examined and approved the MMLA; that MMLA is not unconstitutional as a denial of Equal Protection Laws because pregnancy disability laws are not subject to constitutional scrutiny, but if they are, the MMLA bears a close and substantial relationship to the legitimate state objective of eliminating employment discrimination against women because of pregnancy.

The Commissioner contends that the MMLA, viewed in the light of the purposes of Title VII, is not inconsistent with federal law and so is not preempted by the same; in addition he contends that Miller-Wohl may not attack the MMLA with a policy which in itself violates Title VII; Commissioner further contends with respect to the Equal Protection argument that legislation based on pregnancy is not a gender-based classification for the purpose of equal protection analysis and need only be justified on a reasonable basis, but even so, the MMLA could survive the more difficult test for gender-based classifications, in that the MMLA bears a substantial relationship to an important state interest.

The Montana Human Rights Commission, appearing amicus curiae, supports the constitutionality and validity of the MMLA, contending that the federal constitution does not prohibit the use of gender-based classifications; that the MMLA bears a close and substantial relationship to important government objectives; that the individual dignity section of Article II of the Montana Constitution does not prevent the exercise of the legislature's power to enact statutes containing gender-based classifications; that the MMLA is not preempted by the federal acts; and that in the alternative, this case is not ripe for decision by us on constitutional grounds and we should remand the case for further proceedings rather than hold MMLA unconstitutional.

The combined brief of the American Civil Liberties Union, the National Organization for Women, the NOW Legal Defense and Education Fund, and the League of

Women Voters, appearing amici curiae, while supporting the objective of Tamara generally, takes a somewhat different tack. These amici contend that if this Court construes the MMLA to permit employers to grant greater employment benefits to pregnant employees than to others similar in their ability or inability to work, the MMLA would conflict with Title VII; on the other hand, the MMLA and Title VII impose complementary obligations on employers and so this Court should declare that Montana employers must comply with both statutes to remove any apparent conflict between the two. Therefore this Court should extend MMLA's provisions in a nondiscriminatory fashion rather than invalidate the statute and deny all Montana citizens a benefit the legislature intended to confer.

On the other hand, Miller-Wohl, as the respondent on appeal, contends that the MMLA is defective because it does not require the pregnant employee to be disabled from working in order to be eligible for a leave of absence or protected from discharge, and it is therefore discriminatory as to other employees of Miller-Wohl; that the District Court was correct when it found that the MMLA was preempted and superseded by and in violation of Titles VII and XI of the Civil Rights Act; that the MMLA is a protective and preferential statute and conflicts with Title VII in that it is impossible for a Montana employer to comply with the MMLA and Title VII at the same time; that the MMLA violates the Equal Protection Clause of the Fourteenth Amendment because it provides different treatment of persons on the basis of their sex; that in determining the equal protection argument the intermediate tests or affirmative action test should be applied; and that the MMLA has no close or substantial relationship to any governmental interests.

The Women's Law Section of the State Bar of Montana, appearing amicus curiae, supports the appellants in contending that the MMLA is not preempted by Title VII; that under traditional equal protection analysis the MMLA does not create a gender-based classification; but if the

MMLA does create a gender-based classification, it is not an invidious discrimination.

The Montana Education Association, appearing amicus curiae, also supports the appellants, contending that the MMLA is not preempted, and does not violate constitutional equal protection guarantees; that it is not an unlawful protective legislation, and that it protects an important state governmental interest.

III.

Miller-Wohl is a chain that operates about 290 ladies' wear stores throughout the United States. Four such stores are located in Montana.

On the face of them, the written employment policies of Miller-Wohl are nondiscriminatory. The employment policies are printed in a booklet, at least one copy of which is kept at each store, sometimes distributed to employees (Tamara says she did not receive one), and the provisions explained and discussed with the store managers at employee meetings. The written employment policies contain the following provisions which are pertinent to this case:

> "It is the policy of the Miller-Wohl Company to forbid acts of discrimination in all matters dealing with employees . . .
>
> "It has been the established policy of Miller-Wohl to provide equal employment opportunities to all qualified applicants who seek job opportunities with the Company at every level of employment. Hence, we do not discriminate against anyone because of race, color, age, sex, or religion.
>
> ". . .
>
> "11. Sick Leave:
> All regular full-time employees with one year seniority are entitled to receive up to five days

of sick leave with pay for legitimate illness incurred during the calendar year.

". . .

"16. Leaves of Absence:
All employees, after one year of seniority, may receive a leave of absence in cases of protracted illness. Such leaves of absence shall be for three months. If the employee requires more than three months, an additional three months may be granted upon reapplication.

"All other types of leaves are strictly within the discretion of the Manager.

". . .

"17. Maternity:
When an employee leaves for pregnancy, she will be granted a leave of absence for a period of time that includes the post-natal physical examination."

". . .

"22. Time Off:
If you need to have time off from your job, make your request to your Manager. A limited amount of time off may be granted for good reason.

"Absence is considered to be excused for the following reasons only:

"1. Illness certified by doctor's certificate; 2. A death in the employee's immediate family; 3. A wedding in the employee's immediate family; 4. With the Manager's permission.

". . .

"28. Extension of Benefits:
The benefits described herein are intended

> primarily for the regularly working employee. As such, the benefits are directed toward the full-time and regular part-time employees. These benefits, however, may be extended to other employees within the discretion and approval of your Manager and District Supervisor."

It may be gleaned from the foregoing paragraphs of the employment policies of Miller-Wohl that all employees may receive a leave of absence without pay in cases of protracted illness. In cases of maternity, there is a provision that the woman will be granted a leave of absence for a period of time that includes post-natal physical examination. Regular full-time employees with one year seniority earn sick leave based on the years in service. Time off for good reason will be granted; and finally those benefits which are intended primarily for the full-time and regular part-time employees may also be extended to other employees in the discretion of the manager.

Because the written policies indicate that Miller-Wohl would extend to pregnant women a reasonable leave of absence to cover their disabled time, without pay, it is suggested to us by the ACLU, NOW, and the League of Women Voters that this clause should be remanded for clarification of dispositive factual issues as to whether Miller-Wohl granted such leaves, and under what circumstances. Undoubtedly, evidence that Miller-Wohl had granted some employees leave for an appendectomy, a broken limb, or other reason, but had refused Tamara leave for her pregnancy disability would automatically suggest that Miller-Wohl applied its discretionary leave in a discriminatory way. McDonald Douglas Corp. v. Green (1973), 411 U.S. 792. We decline to take that position, however, because under the testimony in this case, Miller-Wohl's actual handling of leave for pregnancy cases belies the benign provisions of its written employment policies. The area supervisor for Miller-Wohl testified:

"Q. In regard to the one year requirement, as a supervisor and earlier when you were a store manager, was there meetings with the store managers by the supervisor in regards to these items? A. Yes.

"Q. What was said if anything in regards to this ah, maternity leave and sick leave benefits provisions? A. It was pointed out that in the company's manual that unless an employee had been in employment with us for a minimum of one year the policy would not be deviated from. It would hold true.

"Q. And this policy applies to male and female employees? A. Yes it does.

"Q. Have you had employees with less than one year of employment who are pregnant, or sick, or ah injured, or ah, I mean an off the job injury or other reasons for a leave of absence to be requested and not granted? A. Would you like to rephrase that one more time? You talk too fast.

"Q. Try again. Sorry. Have you had employees with less than one year of employment who have been pregnant, or ill, or injured, or some other meritorious reason for requesting or seeking leave of absence? A. No one has ever been given leave of absence without being employed for us for one year at least."

The store manager from the Great Falls store testified:

"Q. Did Tamara Buley have a guide? A. It was made available to her, yes.

"Q. Did you discuss it with her? A. Yes we did.

"Q. Did you discuss the one year requirement for benefits? A. Yes we did.

"Q. Is that discussion of the one year benefit brought to the attention of the employees?

A. It was brought to the attention of any one that comes to work in the store."

The testimony of the area supervisor and of the Great Falls store manager makes it clear that despite the language contained in the employment guide provisions which relate to employment policy, in actuality Miller-Wohl conducts a policy of no leave for any disabled employees with less than one year employment experience with Miller-Wohl. We therefore determine this case in the circumstance that in actual practice Miller-Wohl extended no leave of absence from employment to any temporarily disabled employee until the end of the first year of employment.

IV.

Under the MMLA, it is unlawful in Montana for an employer to terminate a woman's employment because of her pregnancy, or to refuse to grant the employee a reasonable leave of absence for such pregnancy. Miller-Wohl clearly violated this statute. Section 49-2-310, MCA (1983).

Therefore, unless the MMLA is invalid as contended by Miller-Wohl, the Commissioner was correct in determining a violation of the MMLA had occurred, and that Tamara was entitled to back pay and penalties for her wrongful discharge. See section 49-2-311, MCA (1983).

The latest pronouncement by the United States Supreme Court of which we are aware in the field of pregnancy-related employment practices is Newport News Ship Building and Dry Dock Company v. EEOC. (1983), U.S. , 103 S.Ct. 2622, 77 L.Ed.2d 89.

In *Newport News,* the employer had provided a health insurance plan which contained hospitalization benefits for pregnancy-related female disabilities but provided less extensive pregnancy benefits for spouses of male employees. The Supreme Court held that the limitation of benefits for spouses of male employees discriminated against the male employees in violation of section 703(a)(1) of Title

VII. In holding that Congress by enacting the PDA had overturned the Supreme Court's holding of General Electric Co. v. Gilbert, supra, the Supreme Court found that differential treatment of pregnancy is gender-based discrimination because only women can become pregnant, that the PDA makes it clear that discrimination based on pregnancy is on its face discrimination based on sex and that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan.

Tamara's case presents a somewhat different aspect than *Newport News*. Female spouses of male employees were not included in the *Newsport News* benefits plan though female employees were; in Miller-Wohl's case its no-leave policy for employees under one year of employment experience applies equally to male and female employees.

While Miller-Wohl's no-leave policy was facially neutral as to Tamara and her class, it should not escape us that Tamara is not so much before us because of refusal to grant her pregnancy leave. She was in fact terminated from her employment. She was discharged because she was pregnant. Title VII provides that it is an unlawful practice for an employer to discriminate against any individual with respect to his employment "because of . . . sex." Under the PDA, the term "because of sex" includes "because of . . . pregnancy . . . ; women affected by pregnancy . . . shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ." Section 701(k), PDA (42 U.S.C. 2000e(k)).

When Title VII as amended by the PDA is understood properly, it becomes clear that the discharge from her employment of a woman for her pregnancy, without more, is an unlawful practice under Title VII and the PDA. It is a gender-based discrimination. The discharged pregnant woman is not treated the same for all employment-related purposes as all other persons not so affected, obviously, because men cannot be discharged for the same reason. The

intent of Title VII and the PDA that women should be treated equally with men on matters of employment means that women cannot be discharged simply because they are pregnant.

Tamara's disability came relatively early in her pregnancy. Not all women suffer from "morning sickness." Many pregnant women seem to be able to work nearly to the hour of their delivery, and to return to employment shortly after delivery. Inevitably, however, childbirth involves some period of disability. Testimony before the House Committee on Education and Labor, considering the adoption of the PDA, indicated that normal period of pregnancy leave is about six weeks. HR Rep. No. 95-948, 5 U. S. Code Congressional and Administrative News 4749, 4753 (1978). An employer's no-leave policy therefore poses a drastic effect on women employees of childbearing age, an impact no male would ever encounter.

In Abraham v. Graphic Arts International Union (USCA 1) (1981), 660 F.2d 811, the employer of a temporary employee had a policy of granting ten days leave and no more to any disabled employee. Abraham was hired for a temporary project, as long as it received funding. She was discharged for work absence incidental to her impending motherhood. She had been given no leave of absence for her pregnancy. The circuit court held:

> "An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy that it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action. As the Equal Employment Opportunity Commission had declared:
>
> "'[W]here the termination of an employee who was temporarily disabled is caused by an employment policy under which insufficient

> or no leave is available, such a termination violates the Act if it has a disparate impact on employment of one sex and is not justified by business necessity.'
>
> "Beyond peradventure, the limitation of leave to ten days affected women employed in PEP program much more severely than any male engaged therein, or elsewhere in the union's hire. It therefore cannot afford the union refuge unless demonstrably it was required by the exigencies of the project, a matter to which we now turn." 660 F.2d at p. 619."

The Abraham case was remanded by the Circuit Court to the United States District Court for the reason that summary judgment in favor of the employer was improper. The reasons given by the circuit court for the remand are cogent in this case, for the principle remains the same, the employer provided a leave policy that was inadequate for pregnant women and gender-based in its impact upon one sex as compared to the other.

Miller-Wohl's no-leave policy created a disparate effect on women who become pregnant compared to men who do not become pregnant. Although the policy was facially neutral, it nonetheless subjected pregnant women to job termination on a basis not faced by men. The no-leave policy therefore appears to us to be gender-based discrimination by an employer in violation of Title VII and the PDA.

V.

The appellants point out that usually an attack on legislation because of its discriminatory effect is mounted by a person discriminated against. Here Miller-Wohl as an employer was not discriminated against. Appellants therefore claim that Miller-Wohl has no standing to claim that the MMLA was discriminatory. We conclude however that the impact upon Miller-Wohl is direct and substantial and it has standing to raise the validity of the MMLA as such an employer.

VI.

Sorting out the legal issues in this case is like walking through a hall of mirrors, so many facets are presented; or it is like examining a bagful of inconsistencies, such differing interpretations of the federal and state statutes are given us.

Miller-Wohl violated MMLA; it claims not to have violated Title VII, and the PDA, but to have complied with the letter of those federal laws. Miller-Wohl claims it cannot obey both sets of laws.

The District Court and Miller-Wohl find that the MMLA is protectionist legislation favoring one sex above the other.

Yet the District Court held, and Miller-Wohl contends, that the MMLA is not [sic] gender-based, because MMLA discriminates in favor of pregnant women over non pregnant women.

Tamara, the Commission, and most amici see no conflict between the MMLA and Title VII, as amended by PDA; they contend that the objectives of the state and federal legislation are the same, to provide for equality for women on the job market.

The ACLU, NOW, and the League of Women Voters see in MMLA the kind of protectionist legislation that historically hurt rather than helped women, and kept them in marginal jobs; yet these amici would preserve the MMLA by judicially extending its benefits to all sexes.

The Commissioner sees no gender-based discrimination in MMLA, pointing to the protection of both sexes by preserving the right of husbands and wives to procreate and raise a family without sacrificing the income of the wife to support the family after pregnancy.

In the construction of statutes, we are directed by law to construe their provisions liberally with a view to effect their objects and to promote justice; when a statute

is equally susceptible to two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Sections 1-2-103, -104, MCA.

In attacking the MMLA, Miller-Wohl contends that the Montana statutes are in violation of the equal protection clause of the federal constitution, are discriminatory, and are preempted and superseded by and in violation of Titles VII, and XI, of the Civil Rights Act.

First Miller-Wohl states that the MMLA favored nondisabled pregnant employees to the exclusion of all other employees. It points to an internal difference found within the MMLA:

> "It shall be unlawful for an employer or his agent to:
>
> "(1) Terminate a woman's employment because of a pregnancy;
>
> "(2) Refuse to grant to the employee a reasonable leave of absence for such pregnancy;
>
> "(3) Deny to the employee *who is disabled,* as a result of pregnancy any compensation to which she is entitled to the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of said pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; . . ."

Miller-Wohl claims that subsections (1) and (2) of section 49-2-310, MCA, apply to all employees who are pregnant, and not to employees who are disabled as a result of pregnancy, in contrast to subsection (3) which specifically delineates the pregnant employee *who is disabled* as a result of such pregnancy. Thus, Miller-Wohl claims that the provisions of MMLA require an employer to grant maternity leaves of absence to nondisabled pregnant employees as well as to pregnant employees and in that manner is

discriminatory, protective, preferential, and in contradiction of Title VII.

Miller-Wohl further contends that MMLA offends Title VII of the Civil Rights Act as amended by the Pregnancy Disability Act, section 701(k) with respect to the following language:

> ". . . and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this Title shall be interpreted to permit otherwise. . ."

Miller-Wohl contends that the federal law requires equal employment policy only when the pregnant employee is disabled and therefore the state law is in conflict with the federal law.

We reject Miller-Wohl's arguments on these points. Miller-Wohl is arguing on a statement of facts that are not before this Court, and were not before the District Court nor the Commission. We are not considering in this case a nondisabled pregnant employee. Tamara Buley was disabled by virtue of her pregnancy, and eventually was discharged for that disability.

Disability as a result of pregnancy is not the *sine qua non* for the application of PDA; it requires no more than the "medical condition" of pregnancy. The PDA states:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to because of or on the basis of pregnancy, childbirth or related medical conditions . . ." 42 U.S.C. 2000e(k).

We agree with Judge Paul G. Hatfield, who determined this argument with clarity:

> "First, under the Equal Protection Clause, as contrasted with the statutory Pregnancy Discrimination Act discussed infra, men and women are not treated unequally when pregnancy is the one physical condition given preferential treatment. Rather, by removing pregnancy-related disabilities as a legal grounds for discharge from employment, the MMLA places men and women on more equal terms. All workers, male or female, disabled for any reason other than pregnancy are still treated identically. Whether the disability or sickness is one that members of either sex could suffer, such as a broken leg, or hepatitis — or is one that members of only one sex could suffer — such as a ovarian cyst or prostatitis — the MMLA still permits plaintiff to treat workers under its leave policy with equal severity. The MMLA merely makes it illegal for an employer such as plaintiff [Miller-Wohl] '. . . to burden female employees in such a way as to deprive them of employment opportunities because of their different role.' National Gas Company v. Satty, 434 U.S. 142, 98 S.Ct. 347, 351, 54 L.Ed.2d 356 (1977)." Miller-Wohl v. Commissioner of Labor and Industry, etc., (1981), 515 F.Supp. 1264, 1266.

In 27 A.L.R. Fed. 537, 554, § 3[b] are annotations of cases before the Equal Employment Opportunity Commission relating to employers' policies of granting maternity leave only to employees who have been employed for a particular length of time. The EEOC finds such a policy to be discriminatory under Title VII. The reasons given include the fact that such maternity leave policies have a foreseeable adverse effect on the terms and conditions of female employment, without an equivalent effect upon similarly placed males. In the absence of a legitimate business necessity reason for such a policy, the EEOC takes official

notice of the fact that pregnancy, being a natural, expectable, and societally necessary condition, is certain to occur in a statistically predictable number of females in the labor force. Thus, an employment policy of not providing any leaves of absence, although neutral on its face, has an exclusive impact upon female workers in violation of Title VII.

Again, the holding in Abraham v. Graphic Arts International Union, supra, supports our conclusion with respect to the effect of Title VII, where inadequate leave is provided. The United States Supreme Court case of *Newport News Shipbuilding And Dry Dock Company v. EEOC*, supra, which finds that Title VII mandates equal treatment between male and female employees is in our opinion consonant with what we state here respecting Title VII and the implications of the MMLA respecting Title VII.

For the same reasons, we find that the MMLA is not preempted by either Title VII or the PDA. MMLA is consistent with the federal acts, and they permit state action in the same field. Section 42 U.S.C. 2000h-4; 2000e-7, supra.

VII.

As we noted above, a brief submitted by one set of amici suggested that the MMLA is invalid as being protectionist and paternalistic, but that its invalidity could be saved if this Court would extend the benefits of the MMLA on a gender-neutral basis to all workers.

Although we have found that the MMLA is not violative of federal law, there are, nevertheless, good reasons existing why the Court or legislature should consider extension of the same benefits.

In Welsh v. United States (1970), 398 U.S. 333, 361, 370, 90 S.Ct. 1792, 1810, 26 L.Ed.2d 308, (Harlan, J., concurring), Justice Harlan suggested a test for determining whether extension or invalidation was appropriate:

> "[i]t is . . . necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." 398 U.S. at 365.

Extension of the reasonable leaves afforded by the MMLA to all workers would indeed further the State's general interest in promoting the health and welfare of all its citizens and the legislature's concern for sexual equality and stable and workable family relationships. It would establish the goal of sexual equality in the work place contemplated by the MMLA and eliminate hostility and resentment toward pregnant workers from those who are denied reasonable disability leaves.

A policy which provided for disability leave without pay for all employees would cause the employer no financial disruption and little administrative expense.

More important to this case, however, extension of such MMLA benefits to all workers would end any argument that the MMLA is indeed sex based discrimination in violation of Title VII. In Hays v. Potlatch Forests (U.S.C.A. 8 1972), 465 F.2d 1081, the Court of Appeals sustained a District Court which had before it an employer-challenge to an Arkansas law requiring overtime pay for women but not for men. The Court of Appeals approved the District Court's order to eliminate discrimination by requiring that the male employees be paid an equal amount for overtime as required for women, finding thereby no frustration or impedance of the purposes of Title VII. The same rationale applies here.

The legislature will be meeting shortly after the time of this decision. It can take up the question of extending such benefits, in order to save the purposes of the MMLA free from any doubt. We defer extension to the consideration of the legislature. We heartily recommend consideration of such language by the legislature.

VIII.

In accordance herewith, the judgment of the District Court declaring MMLA invalid is hereby reversed; the order of the Commission awarding back pay and penalties to Tamara Buley is reinstated; this cause is remanded to the District Court for such further proceedings as may be necessary in accordance with this opinion, and with directions to remand to the Commission.

/s/ John C. Sheehy
Justice

We Concur:

/s/ Frank I. Haswell
Chief Justice

/s/ John Conway Harrison

/s/ L. C. Gulbrandson

/s/ Fred J. Weber

/s/ Daniel J. Shea

/s/ Frank B. Morrison, Jr.
Justices

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE MILLER-WOHL COMPANY, INC.,	)	
Petitioner,	)	
vs.	)	CAUSE NO. CDV-80-1096
COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,	)	ORDER
Respondents.	)	

On June 3, 1983, a hearing was held on the Petition for Judicial Review filed herein by Miller-Wohl Company and on the Motion for Judgment filed herein by the Commissioner of Labor and Industry.

Appearances at the hearing were as follows: Paul J. Van Tricht, attorney for the Commissioner; Richard Buley, attorney for Tamara L. Buley; Charles L. Fine and Cresap S. McCracken, co-counsel for Miller-Wohl Company.

Oral argument was presented by all counsel. Post-hearing Briefs were ordered and filed by counsel.

MEMORANDUM DECISION

The facts which give use to this litigation are recited in the Commissioner's Findings, Conclusions and Order, and in the various Briefs and exhibits attached thereto filed herein.

Suffice it to say, Tamara L. Buley was employed by Miller-Wohl in its Great Falls store for about three weeks

when she was terminated by her employer because of temporary disability (illness) caused by her pregnancy. She was not granted a sick leave or an unpaid leave of absence because of the employment policy of her employer which prohibited sick leaves and leaves of absence to employees of less than one year seniority. Tamara was terminated because she was not performing her job satisfactorily caused by her pregnancy related sickness.

Tamara filed a Complaint with the Commissioner of Labor and Industry and, after a hearing thereon, the Hearing Officer prepared his Findings, Conclusions and Order. In summary, the Hearing Officer found that Miller-Wohl had violated the Montana Maternity Leave Act in terminating Tamara, ordered Tamara to be re-hired, ordered calculated back wages to be paid together with a 100% penalty.

Miller-Wohl Company then timely filed its Petition for Judicial Review. The Commissioner subsequently filed his Motion for a judgment to enforce the earlier Order of the Commissioner.

Miller-Wohl asks that this Court reverse the Order of the Commissioner on the law. The argument is that the Maternity Leave Act is unconstitutional and/or pre-empted by federal law; more specifically that the state law prefers non-disabled pregnant females to the discrimination of disabled non-pregnant females and disabled males. Hence, Tamara's rights arise from an invalid law and are therefore non-existent.

Miller-Wohl also argues that even if Tamara's employment was unlawfully terminated because it was based on a termination due to a temporary disability caused by her pregnancy, she was only entitled to an unpaid leave of absence during her pregnancy and Miller-Wohl offered to reinstate her a month before she gave birth and she refused re-instatement, hence no unpaid wages are due to her.

Upon a review of the Transcript herein, and a consideration of the Briefs and oral arguments presented

herein, this Court concludes that the Hearing officer erred on the law herein and his Order should be reversed. This Court concludes that the Maternity Leave Act is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring non-disabled pregnant employees to the discrimination of disabled/non pregnant employees and disabled male employees, and is pre-empted by Titles VII and XI of the federal Civil Rights Act. Specifically this Court rules that the Commissioner's Order should be reversed because it is in violation of constitutional and statutory provisions. See Section 2-4-704 (2)(a) MCA relating to standards of review.

It was argued therein that this Court should give consideration and in fact should follow the reasoning of the U. S. District Court in its opinion which granted a Summary Judgment to the Commissioner in a Declaratory Judgment action filed by Miller-Wohl after Tamara had filed her Complaint with the Commissioner but before the Hearing Officer held his hearing thereon. However, the U. S. District Court's judgment was appealed to the U. S. Circuit Court of Appeals for the Ninth Circuit and vacated there because the appellate court ruled the U. S. District Court had no jurisdiction over the subject matter. Consequently this Court is not bound by the law set forth in the U. S. District Court's opinion.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Order of the Hearing Officer is reversed.

IT IS FURTHER ORDERED that the Commissioner's Motion for Judgment is denied.

DATED this 7th day of February, 1984.

/s/ Joel F. Roth

DISTRICT JUDGE

cc: Charles L. Fine
Cresap S. McCracken
Paul J. Van Tricht
Richard Buley

DEPARTMENT OF LABOR AND INDUSTRY
LABOR STANDARDS DIVISION

Thomas L. Judge, Governor — State Capitol

STATE OF MONTANA

(406)449-5600 — Helena, Montana 59601

BEFORE THE COMMISSIONER OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of Tamara L. Buley Complainant vs. Miller-Wohl Company, Inc. d/b/a Three Sisters Respondent	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER

I. INTRODUCTION:

On August 6, 1980 the Commissioner of Labor and Industry, State of Montana received a complaint from Tamara L. Buley of Great Falls, Montana. Mrs. Buley alleged a violation of the Montana Maternity Leave Act (Section 39-7-201 et seq. MCA) by her former employer, Miller-Wohl Company, Inc. Miller-Wohl Company, Inc. does business as Three Sisters, a clothing store, which is located in the Holiday Village Mall, Great Falls, Montana.

Subsequent to service of the Notice of Complaint and Hearing, Miller-Wohl Company, Inc. filed a Declaratory

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[*Typographical errors appear in the original text.]

restraining order on September 9, 1980. That order enjoined the Commissioner and his hearing examiner from holding a hearing on this complaint. The restraining order expired on September 22, 1980.

A hearing was held on this complaint on October 1, 1980 in Great Falls, Montana before Paul J. Van Tricht, hearing officer for the Labor Commissioner. Miller-Wohl Company, Inc. was represented by Charles Fine, Attorney at Law. Tamara L. Buley was represented by Richard Buley, legal intern for Tipp, Hoven and Skjelset.

Notice is taken of the Respondent's legal positions in the above cited pending United States District Court action.

II. FINDINGS OF FACT

1. Tamara L. Buley was an employee of Miller-Wohl Company, Inc. Miller-Wohl Company, Inc. operates a clothing store, Three Sisters, in the Holiday Village Mall in Great Falls, Montana. Mrs. Buley began her employment at Three Sisters on about August 1, 1979. She was a salesperson.

2. Miller-Wohl Company, Inc. owned about four stores in Montana and about 280 stores in the United States. Miller-Wohl Company, Inc. was engaged in interstate commerce during the period in contention.

3. Tamara L. Buley was paid $2.90 per hour, the federal minimum wage. As a salesperson she waited on customers, stocked merchandise, cleaned, etc.

4. Mrs. Buley determined she was pregnant about August 14, 1979. Shortly before August 14, 1979 she began to experience "morning sickness", e.g., temporary nausea, dizziness, etc. Mrs. Buley experienced "morning sickness" on a number of occasions while at work. She was "sent home" several times because of "morning sickness." The management of the store knew that Mrs. Buley was pregnant and knew that her illness was because of her pregnancy. On August 27, 1979 Mrs. Buley's employment with

Three Sisters was terminated by Judy Zeman, the store manager.

Mrs. Buley was terminated because she was unable to adequately perform her duties; she was unable to adequately perform her duties because she had "morning sickness." Mrs. Buley had "morning sickness" because she was pregnant. Mrs. Buley was ill, temporarily disabled, because of pregnancy and was terminated because of her temporary disability — her pregnancy.

Therefore I find that Miller-Wohl Company, Inc. violated Section 39-7-203(1) MCA by terminating Tamara L. Buley's employment because of her pregnancy.

5. The "Employees Guide," the employment policy, of the Miller-Wohl Company, Inc. (Exhibit A) does not allow for any leave of absence for employees with less than one year's service. Following that policy, Miller-Wohl Company, Inc. did not offer or grant Tamara Buley a leave of absence during her illness which was the result of her pregnancy.

Therefore, I find Miller-Wohl Company, Inc. violated Section 39-7-203(2) MCA by not granting Tamara L. Buley a reasonable leave for a temporary disability which resulted from her pregnancy.

6. Mrs. Buley gave birth on about April 4, 1980.

7. In March, 1980 Miller-Wohl Company, Inc. offered to re-employ Tamara L. Buley. Mrs. Buley declined that offer because Miller-Wohl Company, Inc. offered it as a complete settlement of this matter.

8. Mrs. Buley was not hired to work a regular 40 hour work week. Her work week was to fluctuated according to the seasonal retail business of Three Sisters. During the back to school season, August, and the Christmas season, Thanksgiving to January 1, 1980, Mrs. Buley was to work a 34 to 40 hour workweek.

During the remainder of the year she was to work a 16 to 20 hour workweek.

From about August 27 to November 22, 1979 Mrs. Buley could have worked approximately 252 hours.

252 hours x $2.90/hour $730.80

From November 22, 1979 to January 1, 1980 Mrs. Buley could have worked approximately 240 hours.

240 hours x $2.90/hour $696.00

From January 1, 1980 to March 1, 1980 Mrs. Buley could have worked approximately 180 hours.

180 hours x $3.10/hour $558.00

(Note: The federal minimum wage increased to $3.10/hour on January 1, 1980.)

From March 1, 1980 to August 1, 1980 Mrs. Buley could have worked about 260 hours allowing for her delivery and recovery from the birth.

260 hours x $3.10/hour $806.00

From August 1, 1980 to September, 1980 Mrs. Buley could have worked about 160 hours.

160 hours x $3.10/hour $496.00

Mrs. Buley sought to mitigate her damages by seeking other similar work in the Great Falls area. She was unsuccessful.

The approximately $3,286.80 in wages has been due and owing Tamara L. Buley by Miller-Wohl Company, Inc. over twenty days exclusive of Sundays and legal holidays. Therefore, Miller-Wohl Company, Inc. owes Tamara L. Buley a penalty of $3,286.80 pursuant to Section 39-3-206 MCA.

9. Miller-Wohl Company, Inc. was not shown to be guilty of oppression, fraud or malice.

III. CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry, State of Montana has jurisdiction over this complaint under the Montana Maternity Leave Act (Section 39-7-201 et. seq.

MCA). Specifically, Section 39-7-205 MCA provides: "A person claiming to be aggrieved by a violation of 39-7-203 or 39-7-204 may make, sign, and file a verified complaint with the commissioner, which shall state the circumstances of the violation and the particulars thereof and shall contain such other information as may be required by the commissioner." Section 39-7-206(1) MCA gives the commissioner the power to investigate complaints. Section 39-7-206(2) and 207 MCA gives the commissioner or his authorized representative, authority to hold a hearing to determine the validity of the complaint.

The commissioner or his authorized representative, also has authority to hear this complaint under Section 39-3-211 MCA. That section authorizes the commissioner to "take an assignment of [a wage] claim in trust for such employee and . . . maintain any proceeding appropriate to enforce the claim, *including liquidated damages pursuant to this [act].* (Emphasis supplied.) "This section is compatible with holding a hearing . . . *"Burgess v. Softich,* M , 535 P2d 178 (1975).

Further, Section 39-1-102 & 103 MCA provide:

> *"The Department of Labor and Industry shall be charged with the duty of enforcing all the laws of Montana relating to hours of labor, conditions of labor, prosecution of employers who default in payment of wages,* protection of employees, all laws relating to child labor regulating the employment of children in any manner, and to administer the laws of the state relating to free employment offices, and *all state labor laws enacted by legislation.*
>
> (1) in discharging the duties imposed upon the Department of Labor and Industry, *the Commissioner of Labor and Industry or his authorized representatives may administer oaths, examine witnesses under oath, take depositions or cause same to be taken,* deputize any citizen 18 years of age or older to serve

subpoenas upon witnesses, and *issue subpoenas for the attendance of witnesses before him in the same manner as for attendance before district courts.*" (Emphasis supplied)

Section 39-3-209 MCA provides:

"*It shall be the duty of the Commissioner of Labor* to inquire diligently for any violations of this part and *to institute actions for the collection of unpaid wages for the penalties provided for herein in such cases as he may deem proper and to enforce generally — the provisions of this part.*

Section 39-3-210 MCA provides:

(1) The Commissioner or his authorized representatives are empowered to enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they may deem appropriate to determine whether any person has violated any provision of this (act) or any rule issued hereunder or which may aid in the enforcement of the provisions of this (part).

(2) The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony; and take depositions and affidavits in *any proceeding before the Commissioner.*"

Clearly under Section 39-1-102 & 103 MCA together with Section 39-3-201 et. seq. MCA, the Commissioner of Labor and Industry "or his authorized representatives" have the power to institute "any proceeding before the Commissioner," i.e., an administrative hearing, to enforce the provisions of the Wage Payment Act or any law relating to employment apart from a wage assignment under Section

39-3-211 MCA. That is, the Commissioner may institute a proceeding, an administrative hearing, which involves the Wage Payment Act without a wage assignment.

Section 39-3-201 MCA (Section 41-1301 R.C.M. 1947) states: " 'Wages' includes *any money due an employee from the employer* or employers, whether to be paid by the hour, day, week, semi-monthly, monthly, or yearly and shall include bonus, piecework, tips, and gratuities *of any kind.*" (Emphasis supplied.)

The Commissioner of Labor and Industry, State of Montana has clear jurisdiction over the complaint under the statutes and cases cited herein above.

2. At the hearing Respondent moved to disqualify the hearing examiner because he represented himself and the Commissioner of Labor and Industry in the action which was brought in the United States District Court by the Respondent against the hearing officer and the Commissioner. That action was to enjoin the hearing officer and Labor Commissioner from holding this very hearing.

The Commissioner's response to that action was purposefully limited to "procedural issues."

Section 2-4-611 (4) MCA provides:

> On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case. The agency may disqualify the hearing examiner or agency member and request another hearing examiner pursuant to subsection (2) or assign another hearing examiner from within the agency. The affidavit must state the facts and the reasons *for the belief that the hearing examiner should be disqualified* and must be filed *not*

less than 10 days before the original date set for the hearing.

Therefore, the respondent's motion is denied because it was not timely filed and because the facts and reasons which are set forth in the affidavit do not constitute "personal bias, disqualification by law or other disqualification" of the hearing examiner. See Davis Administration Law 3rd Ed § 12.01 et seq.

3. At the hearing the Respondent argued that the Commissioner of Labor and Industry did not have the authority to delegate his authority under Section 39-7-201 et seq. MCA to the hearing examiner. First, the State Maternity Leave Act provides:

> 39-7-206. Investigative powers of Commissioner.
> (1) The commissioner *or his authorized representatives* may enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they consider appropriate to determine whether any person has violated any provision of this part or any regulation issued hereunder or which may aid in the enforcement of the provisions of this part.
>
> (2) The Commissioner *or his authorized representatives* may administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony, and take depositions and affidavits in any proceeding before the commissioner.
>
> 39-7-207. Findings of fact and decision on complaint.
>
> (1) Within 60 days of the receipt of a complaint, the commissioner shall state his findings of fact and decision.

> (2) If, upon all the evidence, the commissioner finds that a respondent has engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall order the respondent to reinstate the complainant if she so desires and to pay to the complainant the damages resulting from the violation.
>
> (3) If, upon all the evidence, the commissioner finds that the respondent has not engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall dismiss the complaint. (Emphasis supplied.)

Therefore, the Montana Maternity Leave Act specifically provides for delegation of the Commissioner's authority to an "authorized representative." Also See 2-4-621(4) MCA. It is implicit in the Montana Administrative Procedures Act and Montana Maternity Leave Act that term, "the Commissioner," refers to the institution of "the Commissioner" rather than the particular individual who currently is the Commissioner, i.e., David E. Fuller. Sound principles of organization requires that the Commissioner of labor concentrate his attention upon the larger and more important questions of policy and practice of an organization which includes the Employment Security Division, the Workers' Compensation Division, the Employment and Training Division, the Board of Personnel Appeals, the Labor Standards Division, etc. In the 1979 fiscal year the Labor Standards Division alone held approximately 170 contested, adversary proceedings; it received over 1200 formal individual complaints under the various laws which the "Commissioner" has delegated to the Labor Standards Division. Further, the "Commissioner" is engaged in extensive litigation.

To require the Commissioner to pass personally upon each action or even a fraction of these actions would be "absurd." *Wirtz v. Atlantic States Construction Co.* 357 F.2d

422 (5th Cir. 1966); *Jay v. Boyd,* 351 U.S. 345, 357, 76 S. Ct. 919, 923, 100 L.Ed 1242 (1956). "It is manifestly necessary that he delegate duties of this sort to subordinate officials." *United States v. Cottman Co.,* 190 F.2d 805, 807 (4th Cir. 1951). See Davis Admin. Law 3rd Ed. Chapter 9.

4. Tamara L. Buley was an employee of Miller-Wohl Company, Inc. d/b/a Three Sisters and Miller-Wohl Company, Inc. d/b/a Three Sisters was an employer of Tamara L. Buley as those terms are defined in the Montana Maternity Leave Act (39-7-201 MCA) and the Montana Wage Payment Act (Section 39-3-201 et seq. MCA).

5. Miller-Wohl Company, Inc. d/b/a Three Sisters is subject to the provisions of the Montana Maternity Leave Act (Section 39-3-201 et seq. MCA). It also is subject to the provisions of the Fair Labor Standards Act.

Tamara L. Buley, a female, is a member of the "class" which is protected by the Montana Maternity Leave Act and the Montana Wage Payment Act.

6. A hearing which is held under the Montana Maternity Leave Act and/or the Montana Wage Payment Act is held in accordance with the Montana Administrative Procedures Act (Section 2-4-101 et seq. MCA). That act provides "a final decision shall include Findings of Fact and Conclusions of Law, separately stated" and "each conclusion of law shall be supported by authority or by a reasoned opinion." The Montana Administrative Procedures Act does not contain an expressed or implied provision which prevents the Commissioner from ruling on federal questions or constitutional questions within the very narrow frame of the statutory "quasijudicial" power which is delegated to him by the Montana legislature. See Mtn States Tel and Tel v. Commissioner, P2d , 36 St. Rep. 1844 (1979).

7. Under the Montana Administrative Procedures Act, the burden of proof is on the claimant to prove her claim by the reliable, probative and substantial evidence based on the whole record.

The burden of proof is defined as the obligation imposed upon a claimant in making her claim and upon a defendant in asserting affirmative defenses and counterclaims, to persuade the trier of the facts by the reliable, probative, and substantial evidence of the truth of what each has affirmatively asserted in his pleading. Although the duty of going forward with the evidence (for instance, when a defendant satisfactorily meets the prima facie case of a plaintiff and the plaintiff must submit more proof to overcome the defense of the defendant) may shift several times during the course of a hearing, if the evidence is evenly balanced the verdict must be against the party who has the burden of proof, because she has failed to prove her case by reliable, probative, and substantial evidence.

When the party who has the burden of proof has produced sufficient evidence to be entitled to a judgment in her favor, a prima facie case has been made out. When the other side presents his evidence, he may overcome the prima facie case. This calls for going forward with evidence in rebuttal.

8. The case law developed under various federal and state civil rights statutes must be applied with caution to the Montana Maternity Leave Act since that act requires far more than nondiscriminatory conduct by an employer; however, that case law does provide guidance in analysis of the instant case.

9. The Montana Maternity Leave Act states:

It shall be unlawful for an employer or his agent to:

(1) *terminate a woman's employment because of her pregnancy;*

(2) *refuse to grant to the employee a reasonable leave of absence for such pregnancy;*

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits

accrued pursuant to p' ..ns maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties;

(4) retaliate against any employee who files a complaint with the commissioner under the provisions of this part; or

(5) require that an employee take a mandatory maternity leave for an unreasonable length of time. (Emphasis supplied.) The Rules of the Commissioner provide:

24.14.301 TERMINATION OF EMPLOYMENT DUE TO PREGNANCY PROHIBITED. Section 39-7-203(1), MCA, provides that it shall be unlawful for an employer or his agent to terminate a woman's employment because of her pregnancy. In applying this section, the Commissioner shall consider "terminations" to include all involuntary dismissals, all resignations in which the employee's resignation was required by the employer or permitted as the sole alternative to dismissal and those situations in which the totality of the circumstances surrounding a resignation by an employee indicate that the resignation was compelled by the conduct or policy of the employer or agent. Coercive conduct by an employer or his agent toward an employee in order to secure her resignation, when the employee's pregnancy constitutes a substantial reason for the conduct, shall be considered a violation of section 39-7-203(1), MCA.

24.14.302 RIGHT TO REASONABLE LEAVE OF ABSENCE. Section 39-7-203(2), MCA provides that it shall be unlawful for an employer or his agent to refuse to grant to the employee a reasonable leave of absence for pregnancy. In determining the standards which shall apply to a request for a leave of absence for pregnancy, an employer shall apply standards *at least as inclusive* as those which he applies to requests for leave of absence for any other valid medical reason.

24.14.304 PREGNANCY-RELATED DISABILITIES TO BE TREATED AS TEMPORARY DISABILITIES. Disabilities as a result of pregnancy, are, for all job-related purposes, temporary disabilities and *shall not be treated less favorably* than other temporary disabilities under any health, medical, or temporary disability insurance plan or sick leave plan maintained by employer. The question of maintenance is one of fact which will be judged upon all of the evidence. No written or unwritten employment policies or practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement or payment under any health, medical, or temporary disability insurance plan, or under any sick leave, disability leave or disability benefit plan whatsoever, whether formal or informal, shall be applied to disability due to pregnancy, *on terms or conditions less favorable than those applied to other temporary disabilities.* (Emphasis supplied.)

These emphasised terms do not, in any way, limit the requirements of the Montana Maternity Leave Act. The fact that the respondent applies its employment policies uniformly does not negate the fact that those policies violate the Montana Maternity Leave Act.

Section 39-7-201 et seq. MCA is in derogation of the common law principle that an employer may terminate any employee for any reason, or no reason, however, Section 1-2-103 MCA provides: "The rule of the common law that statutes in derogation thereof are to be strictly construed has *no application* to the codes or other statutes of the State of Montana. The codes and *their provisions* and all proceedings under them *are to be liberally continued* with a view to effect their objects and to promote justice." (Emphasis Supplied).

Therefore, the Montana Maternity Leave Act must be liberally construed.

The phrase "to terminate a woman's employment because of her pregnancy" is clear in and of itself; and when read in conjunction with paragraphs (2), (3) and (5) the phrase is capable of no other construction than that an employer cannot terminate an employee because of temporary illness associated with her pregnancy, e.g. morning sickness.

The reliable, probative and substantial evidence showed that Tamara L. Buley was terminated by Miller-Wohl Company, Inc. principally because of absence which was associated with morning sickness and therefore was terminated because of her pregnancy within the meaning of Section 39-7-203(1) MCA.

Further, Miller-Wohl Company, Inc. did not allow Mrs. Buley to take a leave of absence during her periods of temporary disability and therefore, it violated Section 39-7-203(2)MCA.

10. The respondent contends that the Montana Maternity Leave Act creates greater rights for pregnant employees (females) than are enjoyed by other disabled employees (males) and therefore violates the 1964 Civil Rights Act, the 14th Amendment to the U.S. Constitution and 42 USC 1983 and 1988, i.e., it "discriminates" against men because men do not get pregnant and therefore, do not benefit from the Montana Maternity Leave Act.

In *Delta Air Lines v. Kramorsky,* 21 FEP Cases 1429 (January 28, 1980) the United States District Court for the Southern District of New York citing *General Electric Co.v. Gilbert,* 429 U.S. 125 ruled on similar constitutional objects to provisions of the New York Disability Benefit Law. (DBL)

In that case the federal District Court held:

> The Supreme Court has never adopted the view that an employment practice is illegal simply because it benefits members of one sex more than members of the other. Title VII forbids discrimination on the basis of "gender

as such" — that is, it forbids an employer from dividing employees into two classes, the class of male employees and class of female employees, and treating those two classes differently with respect to "compensation, terms, conditions, or privileges of employment" (unless the employer can establish that in the circumstances sex is a "bona fide occupational qualification"). 42 U.S.C. 2000c-2. Title VII does not forbid an employer from dividing employees into classes on the basis of some other factor, and treating those classes differently, even though the different treatment may fall more heavily on the members of one sex than on members of the other, unless the employer's practice is a pretext designed to effect an invidious discrimination against members of one sex or the other. This is so even though the Court has recognized that in some circumstances a showing of "disproportionate impact" creates a presumption of invalidity that the employer must rebut by demonstrating that the classification involved serves a legitimate function. See *Gilbert,* supra, 429 U.S. at 136-37, 13 FEP Cases at 1662; Washington v. Davis 426 U.S. 229, 246, 47, 12 FEP Cases 1415, 1422 (1976); *Griggs v. Duke Power Co.* 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971).

Properly characterized the [respondent's] argument is one of disproportionate impact. They note that providing coverage for pregnancy related disabilities benefits some women but no men, and argue that this is to discriminate between men and women on the basis of sex. But in *Gilbert,* supra, the Supreme Court rejected just this sort of analysis. In holding that an employer's failure to provide coverage for pregnancy related disabilities was not discrimination "based on sex", the Court, quoting from its earlier opinion in

Geduldig v. Ajello, 417 U.S. 484, 8 FEP Cases 97 (1974) (rejecting a constitutional challenge to a state employee benefits plan that did not include such coverage), stated: "While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are *constitutionally free to include* or exclude *pregnancy* from the *coverage* of legislation such as this on any reasonable basis, just as with respect to any other physical condtion." 429 U.S. at 134-35, 13 FEP Cases at 1661 (quoting 417 U.S. at 496 n.20 8 FEP Cases at 101)(emphasis added).

The real distinction involved here, as described in *Gilbert* and *Geduldig*, is not that between women and men, but that between pregnant women and nonpregnant persons. It is quite true that the amendments to the DBL benefit "pregnant women" at the expense of "nonpregnant persons" (including many female employees), and it could be argued that this distribution of benefits is unfair to "nonpregnant persons." It is equally true that the amendments benefit women as a class at the expense of men as a class, and it could be argued that this distribution of benefits is unfair to men. But "the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address." *City of Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702, 709, 17 FEP Cases 395, 399 (1978). The New York legislature has addressed that question and determined that whatever class inequities may be involved in

ensuring coverage for pregnancy related disabilities in employee benefit plans are warranted by the social benefits of such coverage.

'The invalidity of the [respondent's] analysis is confirmed by the decision of the Supreme Court in City of *Los Angeles Department of Water and Power v. Manhart*, supra, 435 U.S. 702, 17 FEP Cases 395 (1978), which invalidated the Los Angeles Department of Water and Power's requirement that its female employees make larger contributions to its pension fund than its male employees during the term of their employment, to make up for the fact that women as a class live longer than men, and consequently collect more pension benefits than men following retirement. The Department argued that not to require larger contributions from its female employees would violate Title VII because it would require male employees to subsidize the pension benefits of female employees just as the respondents argue here that not to exclude coverage for pregnancy related disabilities would violate Title VII because it would require male employees to subsidize the disability benefits of female employees (though, as indicated above, the actual effect would be to require male employees and female employees who do not become pregnant to subsidize the benefits of those female employees who do become pregnant). However, in *Manhart* the Court rejected the claim that practices that have a "disproportionately heavy impact on male employees" are illegal per se, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another." 435 U.S. at 170 n.20, 17 FEP Cases at 400 (emphasis in original).

> *Manhart* emphasized that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . [T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." Id. at 708-09, 17 FEP Cases at 399.
>
> The fundamental flaw of the [respondent's] argument that to provide coverage for pregnancy related disabilities would be to discriminate against men is that it focuses on fairness to classes rather than fairness to individuals.

Under the Federal District Court's "Gilbert" analogy the Montana Maternity Leave Act is clearly constitutional and is not in violation of Title VII. However, it is not necessary to rest the Montana Leave Act on an analysis such as that provided in *Delta Airlines*.

Alternately, since the Montana Maternity Leave Act results in unequal treatment of females and males, it might be suspect under the Equal Protection Clause as reflecting a gender based discrimination. Although it could be argued as in *Delta Airlines* that the Act creates two non-gender classes — "pregnant women and non-pregnant persons," the classification system, the Act, could be considered to separate employees into male who cannot become pregnant and female who can become pregnant. Under that premise the Montana Maternity Leave Act is a law which inherently classifies upon gender since this act grants pregnant women different employment rights than those rights which are enjoyed by males.

In *Personnel Administration Sector of Mass v. Feeney*, U.S. , 19 FEP Cases 1377 (1979), the United States Supreme Court stated:

> The Equal Protection Guarantee of the Fourteenth Amendment does not take from the

States all power of classification. *Massachusetts Bd. of Retirement v. Murgia* 427 U.S. 307, 314, 12 FEP Cases 1569, 1572. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *New York Transit Authority v. Beazer,* U.S. 19 FEP Cases 149; Jefferson v. Hackney, 406 U.S. 535, 548 Cf. *James v. Valtierra,* 402 U.S. 137. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. *Dandridge v. Williams,* 397 U.S. 471; *San Antonio Bd. of Education v. Rodriguez,* 411 U.S. 1. In assessing an equal protection challenge a court is called upon only to measure the basic validity of the legislative classification. *Barrett v. Indiana,* 229 U.S. 26, 29 30; *Railway Express Co. v. New York;* 336 U.S. 106. When some other independent right is not at stake, see e.g., *Shapiro v. Thompson,* 394 U.S. 618, and when there is no reason to infer antipathy *Vance v. Bradley,* U.S. , 19 FEP Cases 1, it is presumed that even improvident decisions will eventually be rectified by the democratic process. . . . Ibid.

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. *Caban v. Muhammed,* U.S. (dissenting opinion). This court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives. *Craig v. Boren,* 429 U.S. 190, 197, and are in many settings unconstitutional, *Reed v. Reed,*

404 U.S. 71: *Frontiero v. Richardson,* 411 U.S. 677, 9 FEP Cases 1253: *Weinberger v. Wiesnfeld,* 420 U.S. 636: *Craig v. Boren,* supra: *Califano v. Goldfarb,* 430 U.S. 199:

Further, Justice Marshall stated in his dissenting opinion "To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to achievement of important governmental objectives." See *Califano v. Webster,* 430 U.S. 313, 316-317 (1977); *Craig v. Boren* 429 U.S. 190, 197 (1976); *Reed v. Reed,* 404 U.S. 71, 76 (1971).

The Montana Maternity Leave Act, was an integral part of an effort by the Legislature of the State of Montana to implement Article II, Section 4, of the 1972 Constitution of the State of Montana Article II, Section 4 states:

> "*Individual Dignity.* The dignity of the human being is inviolable. *No person* shall be denied the equal protection of the laws. *Neither the State nor any* person, firm, *corporation,* or institution *shall discriminate against any person* in the exercise of his civil or political rights *on account of* race, color, *sex,* culture, social origin or conditions, or political or religious ideas." (Emphasis supplied.)

While the right to be free from sex discrimination in all its forms currently may not be recognized in the United States Constitution or by the United States Supreme Court as a fundamental right, that right is fully recognized as a fundamental right by the 1972 Montana Constitution. Any interpretation of the Montana Maternity Leave Act or address to the respondent's arguments must be based, in part, on the recognition of this fundamental right and the recognition that the Maternity Leave Act was an integral part of a comprehensive effort by the Legislature to enforce this fundamental right; a fundamental right guaranteed by Article II, Section 4 of the Montana Constitution which was ratified by the electorate of Montana in 1972. The Montana Constitution outlaws "discrimination;" it does not outlaw

different treatment. To treat people "equally" it is often necessary to treat people "differently."

Any legislation which deals in any way with pregnancy must by its very nature result in gender based classifications; the decision on how this legislation is to reverberate throughout Montana is a decision the Montana legislature has made in enacting the Montana Maternity Leave Act. The classification is rationally based on the laws of nature, i.e., biology. The legislation is rationally designed to implement Montana Constitution and accomplish a legislative goal, i.e., the affirmative policy of the State of Montana "to enable women to contribute to society according to their fullest possible potential" and to promote the family by lessening the economic burden of pregnancy." See Section 34-7-101 MCA. Therefore under the rationale used by the U.S. Supreme Court in *Personnel Adm. of Mass v. Feeney* the Montana Maternity Leave Act does not violate the United States Constitution or the Montana Constitution since the classification itself has a rational basis, a nondiscriminatory intent, and bears close relationship to important governmental objectives.

10. The Respondent argues Title VII of the 1964 Civil Rights Act preempts the Montana Maternity Leave Act. However, the 1964 Civil Rights Act provides:

> Title VII, Sec. 708,
>
> *"Nothing in this title shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State,* other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." (Emphasis applied)
>
> Section 1104 of Title XI
>
> *"Nothing contained in any title of this Act shall be construed as indicating an intent on*

> *the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter,* nor shall any provisions of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of the Act or any provision thereof." (Emphasis applied)

The purpose of Congress is the ultimate touchstone in determining whether a state law is preempted by federal legislation. The 1964 Civil Rights Act does not evidence a clear intent to preempt state action. Indeed, it expressly authorizes such state action. Further the District Court in *Delta Airlines* found no federal preemption by the 1964 Civil Rights Act of "state protective legislation" similar to the Montana Maternity Leave Act.

Therefore, the Montana Maternity Leave Act is not preempted by the 1964 Civil Rights Act 42 USC 2000 et seq.

12. Once the claimant has proved a violation of the Montana Maternity Leave Act and established her entitlement to back pay, the burden shifted to the defendant to rebute the claim or to mitigate the liability, *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 10 FEP Cases 1249 (7th Cir. 1975); *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 80 LRRM 3377 (D.C. Cir. 1973). The respondent must show that the complainant failed to earn amounts which she might have earned by reasonable diligence *Equal Employment Opportunity Commission v. Detroit Edison Co.* 515F.2d 301, 315, 19 FEP Cases 239 (6th Cir. 1975).

Again, where an employer violated the Montana Maternity Leave Act, the burden is on the respondent employer to show interim earnings or amounts earnable by the complainant with reasonable diligence. *Wegler v. Board of Education,* 447 F. 2d 1078, 1081, 3 FEP Cases 1212, 1213-1214 (8th Cir., 1971); *Rolfe v. County Board of Education,* 391 F. 2d 77, 81, 9 FEP Cases 1111, 1114 (6th Cir., 1968). The

complainant made an adequate showing that she used reasonable diligence to find other suitable, similar or substantially similar employment and the respondent failed to show she did not mitigate the damages.

13. Section 39-7-207(2) MCA states, "If, upon all the evidence, the Commissioner finds that a respondent has engaged in a violation of 39-7-203 or 39-7-204, he *shall state his findings of fact and shall order the respondent to reinstate the complainant* if she so desires and to pay to the complainant the *damages* resulting from the violation." (Emphasis supplied.)

Section 27-1-202 MCA states, "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." In any action for a breach of an obligation not arising from contract where the defendant has been "guilty of oppression, fraud, or malice, actual or presumed," damages in addition to the actual damages, may be given for the sake of example and by way of punishing the respondent. See Section 27-1-221 MCA. The respondent was not guilty of "oppression, fraud, or malice."

Section 39-3-206 NCA provides a penalty "shall" be assessed against any employer who fails to pay any of his employees. The penalty is a sum equivalent to the fixed amount of five percent of wages due and unpaid for each day, except Sundays and legal holidays, upon which such failure continues after the day upon which such wages were due, except that such failure shall not be deemed to continue more than 20 days after the date such wages were due. The word "shall" means SHALL. As used in statutes, contracts, or the like, this word is generally imperative or mandatory. See *U.S. v. Two Hundred and Sixty-Seven Twenty Dollar Gold Pieces* 255 F. 217, 218.

Section 39-3-204(1) MCA provides, "Every employer of labor in the State of Montana shall pay to each employee the wages earned by such employee in lawful money of the

United States or checks on banks convertible into cash on demand at the full face value thereof, and no person for whom labor has been performed may withhold from any employee any wages earned or unpaid for a longer period than ten business days after the same are due and payable," i.e., each pay day.

It is clear that the labor commissioner can assess the penalty as provided in Section 39-3-206 MCA since Section 39-3211 MCA gives the labor commissioner the right to assess "liquidated damages" i.e., penalty. See *State of Montana v. Holman Aviation Co.* 35 St. Rep. 285, P2d (1978).

Miller-Wohl Company, Inc. owes Tamara L. Buley $3,286.80 in wages and $3,286.80 in penalty pursuant to Section 39-3-206 MCA.

14. The Wage Payment Act (Section 39-3-201 et seq.) and the Maternity Leave Act (Section 39-7-201 et seq. MCA) do not grant the authority to the labor commissioner to award attorney's fees at an administrative hearing. However, see *Garsjo v. Department of Labor and Industry,* 562 P. 2d 473 (1977), where the District Court awarded attorney's fees to a claimant when the respondent filed a Petition for Judicial Review and lost that appeal.

Any finding of fact which is a conclusion of law is adopted as a conclusion of law: any conclusion of law which is a finding of fact is adopted as a finding of fact.

IV. ORDER

Miller-Wohl Company, Inc. is ordered to reinstate Tamara L. Buley to its employ and Miller-Wohl Company, Inc. is ordered to pay to Tamara L. Buley $6,573.60 of which $3,286.80 is back wages due Tamara L. Buley and $3,286.80 is penalty due Tamara L. Buley pursuant to Section 39-3-206 MCA together with such other and further wages and penalty which shall accrue to the claimant up to the date of rehire.

All motions of the parties which are not addressed herein above are denied.

This Order is FINAL to the Department of Labor and Industry, State of Montana and the Commissioner of Labor and Industry, State of Montana.

DATED this 3 day of October, 1980.

/s/ Paul Van Tricht

Paul Van Tricht, Hearing Officer
for the representative of the
Commissioner

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a Petition for Judicial Review with a District Court within thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701 et seq. MCA. A motion for rehearing does not toll this time period.

If no payment is made pursuant to this Order, the Commissioner of Labor will apply to the District Court for a judgement to enforce this Order pursuant to Section 39-3-212 MCA and Section 39-7-209 MCA. Such an application is not a review of the validity of this order.

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 3 day of October, 1980:

Tamara L. Buley
2514 1st Avenue South
Great Falls, Montana
59401

Charles Fine
Clark, Hardy, Lewis, Fine and Polland, P.C.
555 S. Woodward Avenue
Birmingham, Michigan
48011

Cresap S. McCracken
Church, Harris, Johnson and Williams
302 Northwestern Bank Building
P.O. Box 1645
Great Falls, Montana
59403

Richard Buley
303 W. Kent
Missoula, Montana 59801

Three Sisters
Holiday Village Mall
Great Falls, Montana
59401

Brian Bulger
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P.O. Box 2885
Great Falls, Montana
59403

Charles Fine
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Clerk of Court
United States District Court
Federal Building
Great Falls, Montana
59401

/s/ Paul Van Tricht

SB9:g